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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 568

HOWARD B. QUINN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing on Denial of Petition for Certiorari

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May It Please The Court:

The denial of the petition for certiorari in this cause will have the practical effect of validating this instruction:

> "If you find the assumption of truthfulness with respect to all witnesses who are sworn to be outweighed as to any witness, then you will give the testimony of that witness such credibility, if any, as you may think it deserves."

Our petition pointed out that the Seventh Circuit holds this instruction to be proper, and the Third Circuit and First Circuit tend to hold it to be improper. Pet. App., p. 9a. (7th Cir. 1968) *U. S.* v. *Meisch,* 370 F. 2d 768 (3rd Cir. 1966); *McMillen* v. *U. S.,* 386 F. 2d 29 (1st Cir. 1967).

Since the preparation of the petition, the Third Circuit has again considered this instruction in *U. S.* v. *Boone,* 401 F. 2d 659 (3rd Cir. 1968) (Decided 9/24/68). In describing the instruction, the Court said, at p. 661:

> "Ordinarily, an instruction on the presumption of truth is replete with danger in a criminal case because of the possible conflict between the presumption of truth and the superior presumption of innocence."

In the *Boone* case a majority of the panel affirmed the conviction, after indicating disapproval of the instruction, because it appeared that the Defendant, who did not testify, called numerous non-party witnesses to whom the "presumption" would apply under the instruction on a quantitative test, the giving of the instruction was considered harmless error. The dissent, by Circuit Judge Biggs, was critical of this holding (which did not overrule the *Meisch* case), and said (401 F. 2d at page 663):

> "To my mind no jury and no judge could make a valid judgment as to the veracity of witnesses under such conditions. The majority opinion commits the paradox of weighing one imponderable against another."

The *Boone* decision, (401 F. 2d 659) and the other Third Circuit decisions make it plain that there is little excuse for this instruction, and that only the failure of

the Defendant's attorney to make proper objection excused its being given there. Also, the majority declined to give retroactive effect to *U. S.* v. *Meisch*, 370 F. 2d 768 (3rd Cir. 1966). (See 401 F. 2d page 662). Retroactivity would have been required for reversal.

We submit that this instruction invades the province of the presumption of innocence, as guaranteed by the due process clause of the Fifth Amendment. If, at the close of the prosecution's case, the prosecution's witnesses are presumed to have told the truth, then there is likely to be nothing left of the presumption of innocence, and the Defendant will be obligated to take the stand in his own defense if only to overcome some of the "presumption of truthfulness" which will ornament the Government's case. This is an advantage which the prosecution should not have. The presumption of innocence should protect the defendant throughout the trial, as it always has.

The *Boone* case (401 F. 2d 659) also raises the likelihood of confusion which this Court should consider in passing upon this petition. The instruction was justified, in part, by the substantial number of witnesses called by the defendant in the *Boone* case. The Court indicated that the result could be quite different if the defendant's case were presented with fewer witnesses, or without witnesses. This will lead to numerous cases which will decide "how many" witnesses does it take to make the presumption of truthfulness of equal benefit to both sides, and therefore fair. This can be avoided if the Court will consider and either approve or not approve this instruction.

The conflict between the Seventh and Third Circuits on the new found "presumption" or "assumption" of truthfulness is growing as indicated by the *Boone* case (401 F. 2d 659). In the Third Circuit the Defendant makes his decision as to whether or not he should testify unembarrassed by the prospect of an instruction that will hallow the Government's case. His presumption of innocence lasts to the end of the trial. In the Seventh Circuit the presumption of innocence is not so strong; it is invaded by the "assumption of truthfulness", and cannot be relied upon to protect the Defendant after the Government rests. This makes a difference in the protection of the rights of a Defendant. Trial decisions will be made in the Seventh Circuit to put the Defendant on the stand which would be made the other way in the Third Circuit.

We would add that this instruction contradicts much of the experience of mankind, which goes no further than to say that most men probably want to tell the truth. Wigmore On Evidence, Vol. 2, Sec. 650 (3rd Ed.). It is also a judicial intrusion into the thought processes of the jury which is neither necessary nor helpful.

All of this leaves the law in a state in which it lacks uniformity. The Government will have an advantage in the Seventh Circuit which it lacks in the Third. We respectfully submit that the petition for certiorari should be granted in this cause to permit the rendering of a decision which will terminate this conflict between the Third and Seventh Circuits.

In accord with Rule 58 (2) of this Court, counsel for the petitioner does certify that this petition is presented in good faith and not for purposes of delay, and that

this petition is restricted to the ground that the decision of the Third Circuit in *U. S.* v. *Boone*, 401 F. 2d 659 (3rd Cir. Sept. 24, 1968) is an intervening circumstance of substantial effect, for the consideration of which a rehearing should be granted.

Respectfully submitted,

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